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No. 90-727

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In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT G. HOLMES, JR., PETITIONER

v.

SECURITIES INVESTOR PROTECTION CORP., ET AL.,
RESPONDENTS

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF ARTHUR ANDERSEN & CO., COOPERS & LYBRAND, DELOITTE & TOUCHE, ERNST & YOUNG, KPMG PEAT MARWICK, AND PRICE WATERHOUSE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an entity that was neither a purchaser nor a seller of securities in the transaction at issue, and for that reason could not assert a claim for damages under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5), may nonetheless maintain a damages action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c), predicated on alleged violations of Section 10(b).

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INTEREST OF THE AMICI CURIAE

The amici curiae are professional firms engaged in the practice of accountancy. They are the six largest firms of independent accountants in the United States, reporting, collectively, on the financial statements of more than 90 percent of those companies whose securities are publicly traded in the United States.

Congress long ago concluded that independent public accountants perform an important public service. The Securities Act of 1933 and the Securities Exchange Act of 1934 require all public companies whose securities are registered with the Securities and Exchange Commission

to have their financial statements examined by independent accountants. See 15 U.S.C. § 77aa (Schedule A) (25)-(27); *id.* 78*l*(b)(1)(J)-(K).

Amici have in recent years repeatedly been targeted by plaintiffs as a "deep pocket" in various types of litigation. Specifically, amici have witnessed a dramatic increase in the number of state and federal law claims filed against them ostensibly based on their rendition of professional services. Four times as many such claims were made against amici in 1990 as were made in 1981. Amici are concerned that this increase in exposure to the risks of litigation may cause them difficulty in attracting and retaining the most qualified professional personnel. See Note, *Detecting and Preventing Financial Statement Fraud: The Roles of the Reporting Company and the Independent Auditor*, 5 Yale L. & Pol'y Rev. 514, 526 (1987) (accounting profession is "finding it increasingly difficult to attract quality personnel").

The lawsuits filed against amici typically include claims under the federal securities laws, including Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, and—with increasing frequency—claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c). See Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 Notre Dame L. Rev. 896, 897-898 (1990) ("Civil RICO has become one of the statutes of choice for pursuing an alternative route to recovery in federal securities litigation, as plaintiffs seek to find a 'deep pocket' defendant to pay their damage claims") (footnotes omitted). Even when meritless, a RICO claim, which carries liability for treble damages and attorneys' fees, can skew litigation strategies: "the defendant, facing a tremendous financial exposure in addition to the threat of being labeled a 'racketeer' will have a strong interest in settling the dispute." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting).

Because of the substantial impact of even the threat of treble damages liability on a profession whose activities Congress has found to be in the public interest, amici believe that their views on the scope of the RICO damages remedy may be of assistance to the Court's consideration of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

There can be no doubt that "in its private civil version, [the Racketeer Influenced and Corrupt Organizations Act (RICO)] is evolving into something quite different from the original conception of its enactors." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985). See also *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment) ("RICO has 'quite simply revolutionize[d] private litigation' and 'validate[d] the federalization of broad areas of state common law of frauds'") (quoting *Sedima*, 473 U.S. at 501 (Marshall, J., dissenting)); Rehnquist, *Remarks of the Chief Justice on Diversity Jurisdiction and Civil RICO*, 21 St. Mary's L.J. 5, 9 (1989). RICO's extremely broad reach, its harsh penalties—treble damages, attorneys' fees, and stigmatization of the defendant as a "racketeer"—and the fact that the statute confers federal court jurisdiction make RICO claims especially attractive to plaintiffs. The consequent widespread invocation of RICO in ordinary commercial disputes—situations far from the organized crime context that was the focus of Congress's concern—has received considerable criticism. See, *e.g.*, *Sedima*, 473 U.S. at 501-507 (Marshall, J., dissenting); *id.* at 529-530 (Powell, J., dissenting); *RICO Reform Legislation: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 3-5, 365-366, 527-528, 778-782, 790-796, 834-841, 1223, 1230-1232 (1985-1986)

(testimony of various witnesses); Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 Notre Dame L. Rev. 896, 899-900 & nn. 20-21 (1990) (collecting authorities).

This Court determined in *Sedima* that these unanticipated applications of RICO did not justify curtailing the statute's scope by reading into the private damages remedy a requirement that the plaintiff prove, for example, that the defendant had been criminally convicted for the conduct underlying the civil action. The question in this case, however, is not whether RICO's expansive civil liability should be curbed through such requirements. The question here is whether RICO damages actions should be governed by the conventional rules frequently utilized by this Court to determine the appropriate scope of a cause of action. Given RICO's broad reach, it is inconceivable that Congress would have intended to exempt the RICO damages action from the generally-applicable principles governing damages liability under federal law. These principles are dispositive here, establishing beyond any doubt that respondent Securities Investor Protection Corporation (SIPC) may not maintain a RICO civil action predicated on violations of the securities laws where SIPC was neither a purchaser nor a seller of securities.

SIPC's complaint asserted claims against petitioner under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, and under the RICO statute, 18 U.S.C. § 1964(c). The "pattern of racketeering activity" relied upon by SIPC in support of its RICO claim included the alleged Section 10(b) violations. It is undisputed that in order to maintain a claim under Section 10(b), a plaintiff must have either purchased or sold the securities at issue. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). The district court held that SIPC could not

recover under Section 10(b) because it was not a purchaser or a seller. Pet. App. 29a-30a. For the same reason, the court concluded that SIPC could not rely on the alleged Section 10(b) violations as predicates for its RICO claim. *Id.* at 45a. SIPC appealed only with respect to the RICO claim and the court of appeals reversed, holding that a plaintiff who is barred from asserting a damages claim under Section 10(b) may nonetheless rely on Section 10(b) indirectly—and seek treble damages and attorneys' fees—by asserting a RICO action predicated on violations of Section 10(b). Pet. App. 10a-14a.

Nothing in the language or legislative history of RICO justifies that bizzare result. "Congress * * * did not write the RICO statute in a vacuum. It enacted this legislation * * * against the backdrop of almost forty years of federal securities law." *International Data Bank* v. *Zepkin*, 812 F.2d 149, 152 (4th Cir. 1987). A key element of that background is the rule, long adhered to by the federal courts and reaffirmed in *Blue Chip Stamps*, that only purchasers and sellers of securities may recover damages under Section 10(b). "If Congress had intended the dramatic result of overturning this consensus, it surely would have done so in a more explicit way." *International Data Bank*, 812 F.2d at 152. The *Blue Chip Stamps* rule rests in large part on the weighty policy against speculative damages claims. It is inconceivable that Congress would have intended to eliminate that rule in a context in which the danger of such speculative claims would be *increased* by the prospect of recovering treble damages and attorneys' fees.

The language and legislative history of the RICO statute—together with general principles of statutory interpretation—establish beyond any doubt that Congress did not intend to expand the class of persons entitled to recover damages for violations of Section 10(b). Congress intended to "pattern RICO's civil enforcement provision on the Clayton Act." *Agency Holding Corp.* v.

Malley-Duff & Associates, Inc., 483 U.S. 143, 152 (1987). Interpreting the Clayton Act, which states that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages and costs, including attorneys' fees (15 U.S.C. § 15), this Court has held that the right of a plaintiff to maintain an antitrust claim depends upon "the plaintiff's harm, the alleged wrongdoing by the defendant, and the relationship between them." *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 535 (1983) (footnote omitted). In determining whether the relationship between the harm and the alleged wrongdoing is appropriate for the imposition of damages liability, a court must consider the nature of the plaintiff's injury, the directness or indirectness of that injury, whether the claim rests on a speculative measure of harm, and whether the lawsuit would require complex damages proceedings.

The provision of RICO authorizing civil damages actions, which provides in language essentially identical to the Clayton Act that "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. §] 1962" may maintain an action for treble damages and costs, including attorneys' fees, mandates the same type of inquiry. When a plaintiff asserts a RICO claim under Section 1962(c), alleging that the defendant conducted the affairs of an "enterprise" through "a pattern of racketeering activity," the plaintiff's injury must bear an appropriate relationship to the particular type of "racketeering activity" alleged in the complaint. The court must apply the *Associated General Contractors* factors to determine whether the imposition of damages liability is proper.

This determination is easy when the "racketeering activity" relied on by the plaintiff consists of violations of Section 10(b), because this Court answered the very

same question in *Blue Chip Stamps*. The Court's analysis in *Blue Chip Stamps* sought to determine whether an injury incurred by persons who neither bought nor sold securities is sufficiently related to a violation of Section 10(b) to give rise to a right to recover damages. The Court's conclusion that a nonpurchaser-nonseller may not recover in an action implied under Section 10(b) should also apply when a plaintiff relies on that provision indirectly in the context of a RICO claim. The factors relied on in *Blue Chip Stamps*—that Congress's concern in enacting Section 10(b) extended only to injured purchasers and sellers and that permitting recovery by nonpurchasers and nonsellers would encourage speculative (and even fraudulent) damages claims—apply with equal force here.

This Court has construed other broad federal remedies —such as 42 U.S.C. § 1983—to incorporate well-settled limits on damages liability, such as common law immunity rules. In view of the integral position of the purchaser-seller rule in securities law, the same approach is appropriate in determining the class of plaintiffs entitled to recover damages under RICO for violations of Section 10(b).

ARGUMENT

THE SECURITIES INVESTOR PROTECTION CORPORATION MAY NOT MAINTAIN A RICO CLAIM PREDICATED ON SECURITIES FRAUD

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, provides that "[i]t shall be unlawful" to engage in certain "prohibited activities" involving "a pattern of racketeering activity." For example, "any person employed by or associated with" an enterprise engaged in interstate or foreign commerce may not "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Id.* § 1962(c). Other conduct prohibited by Section 1962 includes "us[ing] or invest[ing]"

any "income derived, directly or indirectly, from a pattern of racketeering activity" in connection with an enterprise engaged in interstate or foreign commerce. *Id.* § 1962(a). See also *id.* § 1962(b) (prohibiting use of "a pattern of racketeering activity" to "acquire or maintain, directly or indirectly, any interest in or control of any enterprise" engaged in interstate or foreign commerce); *id.* § 1962(d) (conspiring to engage in any of the foregoing activities).

The statute defines "racketeering activity" to encompass "any act or threat involving" certain specified state-law crimes, an "act" indictable under specified federal statutes, and certain federal "offenses." 18 U.S.C. § 1961(1). This Court addressed the requirement that there be a "pattern" of such activity in its decision in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

Section 1964(c) of RICO states that "[a]ny person injured in his business or property by reason of a violation of section 1962" may maintain an action in federal court for treble damages and costs, including attorneys' fees. The question in this case is whether the Securities Investor Protection Corporation (SIPC) was "injured in its business or property by reason of" a Section 1962 violation predicated on violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. There is no dispute that SIPC could not maintain a damages action under Section 10(b) and Rule 10b-5. It neither purchased nor sold the securities at issue and therefore did not incur an injury compensable under that statute. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). We submit that SIPC may not invoke Section 10(b) indirectly, by asserting a RICO claim predicated on Section 10(b) violations, for essentially the same reason—as a nonpurchaser and nonseller, SIPC cannot satisfy the applicable RICO injury requirement.

This Court first considered the meaning of the phrase "injured in its business or property by reason of a violation of section 1962" in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S 479 (1985) It concluded that Section 1964(c) neither restricts civil liability to defendants who have been convicted criminally of a predicate offense or a RICO violation (*id.* at 488-493) nor imposes a "distinct 'racketeering injury' requirement" that plaintiffs must satisfy in order to recover damages (*id.* at 495). Contrary to respondents' apparent view (Br. in Opp. 13-14), however, *Sedima*'s rejection of these particular preconditions to civil liability does not mean that Section 1964(c) imposes *no* limits on the class of plaintiffs eligible to institute civil RICO actions.

Indeed, *Sedima* itself recognized that a RICO plaintiff may recover damages only if there is an appropriate relationship between the defendant's conduct and the plaintiff's injury. Thus, the Court stated that "the plaintiff only has standing if, and can only recover to the extext that, he has been injured in his business or property by the conduct constituting the violation." 473 U.S. at 496. See also *id.* at 495 (if the defendant's "racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)") & 497 (discussing "recoverable damages occurring by reason of a violation of § 1962(c)"). This case requires the Court to identify the considerations relevant in determining whether the relationship between the defendant's alleged conduct and the plaintiff's alleged injury permits the recovery of damages under RICO.

A. A Plaintiff Is "Injured In His Business Or Property By Reason Of" A Section 1962 Violation Only When There Is An Appropriate Connection Between The Plaintiff's Particular Injury And The Alleged Statutory Violation.

The general principle that a defendant may not be held liable in damages for all direct and indirect injuries flowing from his conduct is well recognized in the law. See,

e.g., *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983); *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (observing, in interpreting a statute, that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step"); *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 179-180, 174 N.E. 441, 444 (1931) (Cardozo, C.J.); *North Shore Gas Co.* v. *EPA*, No. 91-1077 (7th Cir. Apr. 25, 1991), slip op. 3-5 (Posner, J.); *Prosser and Keeton on The Law of Torts* § 36, at 224-225 (5th ed. 1984). The question in this case, therefore, is not whether this principle applies to RICO civil actions—there is no evidence whatever that Congress intended to exempt the RICO civil action from legal rules generally applicable to damages claims—but rather how that principle should be given content in the RICO context. The obvious starting point for that inquiry is Section 4 of the Clayton Act, 15 U.S.C. § 15.

This Court repeatedly has recognized that Section 1964(c) "was patterned after the Clayton Act." *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150 (1987). See also *Sedima*, 473 U.S. at 487, 489. In language virtually identical to that of Section 1964(c), the Clayton Act provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages, costs, and attorneys' fees. 15 U.S.C. § 15(a). "The close similarity of the two provisions is no accident. The 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.'" *Agency Holding Corp.*, 483 U.S. at 151 (quoting *Sedima*, 473 U.S. at 489). Thus, Representative Steiger, who proposed the inclusion of a private treble damages remedy in the statute, characterized his proposal as "similar to the private damage remedy found in the anti-trust laws." *Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st

Cong., 2d Sess. 520 (1970). Other legislators referred to "the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. 35295 (1970) (remarks of Rep. Poff). See generally *Agency Holding Corp.*, 483 U.S. at 151-152.[1]

In view of "the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act" (*Agency Holding Corp.*, 483 U.S. at 152), the decisions construing the scope of the damages remedy created by the Clayton Act provide the most appropriate guide for interpreting Section 1964(c)'s limitation of civil actions under RICO to plaintiffs "injured in [their] business or property by reason of" a Section 1962 violation. See, *e.g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979) (where statutes share common language, common purpose, and where one was the model for the other, it is appropriate to look to prior statute in interpreting subsequently-enacted provision).

This Court's seminal decision interpreting the relevant language of the Clayton Act is *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, *supra*. The Court observed at the outset of its analysis in that case that "[a] literal reading of the [Clayton Act] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." 459 U.S. at 529. The Court concluded, however, that the question whether a

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[1] The statute's legislative history contains a number of other references establishing Congress's clear intent to model Section 1964(c) on the Clayton Act. See, *e.g.*, S. Rep. No. 91-617, 91st Cong., 1st Sess. 81 (1969) (antitrust laws "contain several useful and workable features which are appropriate" in the RICO setting); 116 Cong. Rec. 25190-25191 (1970) (remarks of Sen. McClellan) (civil RICO actions are modeled "upon the concept of Section 4 of the Clayton Act"); *id.* at 35201 (remarks of Rep. Poff); *id.* at 27739 (letter to House Judiciary Comm. from Rep. Steiger); *Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 543-544 (1970) (American Bar Association testimony).

particular plaintiff is entitled to recover treble damages under the antitrust laws "cannot be answered simply by reference to [the statute's] broad language." *Id.* at 535. "Instead, * * * th[at] question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Ibid.* (footnote omitted).

Analogizing the inquiry under the Clayton Act to "the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,'" the Court stated that "[i]t is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations, the infinite variety of claims that may arise makes it virtually impossible to announce a black-letter rule that will dictate the result in every case." 459 U.S. at 536 (footnotes omitted). The Court therefore undertook to "identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 537.

First, the Court examined the "nature of the plaintiff's alleged injury" to determine whether it was "'of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.'" 459 U.S. at 538 (citation omitted). The plaintiff's alleged injury must stem from "an anti-competitive aspect of the practice under scrutiny" in order to satisfy this test. See, *e.g.*, *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 110 S. Ct. 1884, 1889 (1990)

Second, the Court assessed "the directness or indirectness of the asserted injury." *Associated General Contractors*, 459 U.S. at 540. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party * * * to perform the office of a private attorney general" because it "is not likely to

leave a significant antitrust violation undetected or unremedied." *Id.* at 542.

Third, the Court "'consider[ed] whether a claim rests at bottom on some abstract conception or speculative measure of harm.'" *Id.* at 543 (quoting *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 475 n.11 (1982)). If the damages claim rests on allegations that are speculative, the claim may not be maintained. 459 U.S. at 542.

Fourth, guided by "the strong interest * * * in keeping the scope of complex antitrust trials within judicially manageable limits," the Court evaluated "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." 459 U.S. at 543-544 (footnote omitted). If the lawsuit would result in complex damages proceedings, that fact weighs against permitting the plaintiff to proceed.

In view of the close relationship between Section 1964 (c) and the Clayton Act, the foregoing general principles should be applied in determining whether a plaintiff may maintain a RICO civil action under Section 1964(c).[2]

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[2] The Court's decision in *Tafflin* v. *Levitt*, 110 S. Ct. 792 (1990), supports this conclusion. Applying the "deeply rooted presumption in favor of concurrent state court jurisdiction" (*id.* at 795), the Court held that RICO claims may be brought in state court. It rejected the argument that because Section 1964(c) is modeled on the Clayton Act, RICO claims should be treated like antitrust claims, which may be brought only in federal court. *Tafflin* did not dispute the close relationship between RICO and the Clayton Act. The Court instead observed that in *Sedima* and *Agency Holding Corp.* it had "looked to the Clayton Act in interpreting RICO without the benefit of a background juridical presumption of the type present in this case." 110 S. Ct. at 797. The decision in *Tafflin* thus rested on the especially high standard that must be met in order to overcome the presumption favoring concurrent jurisdiction—that Congress "affirmatively or unmistakably intended jurisdiction to be exclusively federal." *Ibid.* In the present case, where the applicable "background juridical presumption" *favors* limitations on private damages remedies (see pages 15-16, *infra*), the Clayton Act analogy is especially appropriate.

We recognize that this Court concluded in *Sedima* that Section 1964(c) does not impose a "competitive injury" requirement (473 U.S. at 497 n.15), observing that "a previous proposal to add RICO-like provisions to the Sherman Act had come to grief in part precisely because it 'could create inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as "standing to sue" and "proximate cause"'" (*id.* at 498 (citation omitted)). But the fact that Congress did not intend the wholesale transfer to the RICO context of specific standing rules developed to govern antitrust actions—such as the competitive injury requirement—should not mean that all Clayton Act jurisprudence is irrelevant in interpreting Section 1964(c). The competitive injury requirement reflects the substantive focus of the antitrust laws. Because RICO is not directed solely against injuries to competition, an across-the-board competitive injury requirement would have been inconsistent with the substantive provisions of the statute.

The competitive injury rule is, however, just a particularized application of the general principle regarding the scope of damages liability, discussed above, that the Court has grounded in the Clayton Act's requirement that a plaintiff be "injured in his business or property by reason of anything forbidden in the antitrust laws." Nothing in this Court's decision in *Sedima* indicated that Congress intended to reject that more general principle along with the competitive injury requirement. Rather, in view of Congress's oft-expressed goal of creating a "'parallel private . . . remed[y]' to the Clayton Act" (*Agency Holding Corp.*, 483 U.S. at 152 (citation omitted)), that general legal principle should be applied—in light of the different substantive provisions of RICO—to develop a separate and distinct doctrine defining the class of plaintiffs entitled to maintain RICO civil actions.

Taking the opposite approach, and ignoring that principle, would frustrate Congress's clear intent that the RICO damages action mirror the antitrust remedy.[3]

Moreover, the approach under the Clayton Act fully accords with general principles of statutory interpretation. The Court typically has looked to general principles governing the recovery of damages, as well as other settled legal concepts and policy considerations, in fixing the precise contours of broad damages remedies. (Indeed, *Associated General Contractors* itself relied on these factors. See 459 U.S. at 531-544). For example, the Court's interpretation of 42 U.S.C § 1983 has drawn heavily on common law rules and policy concerns regarding damages liability. See, *e.g.*, *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986) (applying common law principles); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) (municipalities immune from punitive damages liability on common law and policy grounds); cf. *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980) (Fifth Amendment does not apply to the indirect adverse effects of government action). The same is true of other damages remedies. See, *e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, *supra* (Section 10(b)); *Colligan* v. *Activities Club of New York*, 442 F.2d 686 (2d Cir.), cert. denied, 404 U.S. 1004 (1971)

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[3] This conclusion gains additional support from the fact that Congress did not define racketeering activity to include antitrust violations. If the objection to antitrust standing principles had been that *no* such restrictions were justified with respect to the RICO civil action—rather than the concern that an across-the-board competitive injury requirement was inappropriate for a statute not concerned exclusively with injury to competition—Congress would have included antitrust violations under the RICO umbrella in order to free them from the antitrust standing principles. Congress's failure to take this step establishes that its concern was the inappropriateness of the competitive injury requirement in the RICO context, not a general objection to any limitation on recovery of damages under RICO.

(Lanham Act) The extremely broad scope of the RICO civil remedy, coupled with the fact that a successful plaintiff may recover treble damages and attorneys' fees, makes that general approach especially appropriate in this context.[4]

In order to determine the scope of the RICO cause of action, it is necessary—as we have discussed (see pages 14-15, *supra*)—to apply the general principles set forth in *Associated General Contractors* and this Court's other cases in light of the substantive provisions of the RICO statute. To begin with, RICO actually consists of three separate sub-offenses with somewhat different focuses. See pages 7-8, *supra*. We concentrate here on Section 1962(c), which bars "any person" from conducting the affairs of an enterprise "through a pattern of racketeering activity." This Court has stated that "the compensable injury [under Section 1962(c)] necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Sedima*, 473 U.S. at 497. The focus of the inquiry, therefore, must be on the relationship between the plaintiff's alleged injury and the predicate acts. This

[4] Respondents suggest (Br. in Opp. 14) that *any* limitation on the Section 1964(c) damages remedy is inappropriate because the statute contains a provision stating that it should "be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). That provision does not mandate mindless expansionism, however. *Pinter* v. *Dahl*, 486 U.S. 622, 652-654 (1988). It is difficult to see how RICO's purpose could be affected adversely by rules limiting the class of plaintiffs entitled to seek treble damages to those whose injuries bear an appropriate relationship to the alleged violation. See *Brandenburg* v. *Seidel*, 859 F.2d 1179, 1189 n.11 (4th Cir. 1988) (RICO's liberal construction clause "obviously [was] not intended to read the traditional proximate cause concerns of tort law completely out of civil RICO"). The Court has deemed such an approach proper under the antitrust laws, statutes with a similar remedial purpose (*Agency Holding Co.*, 483 U.S. at 151). It is equally proper under RICO.

approach also has the salutary effect of eliminating the possibility that plaintiffs will invoke RICO in order to circumvent principles that prevent them from maintaining a damages action based directly on the predicate offense itself.[5]

As under the Clayton Act, "the infinite variety of [RICO] claims that may arise makes it virtually impossible to announce a black-letter rule that will dictate the result in every case." *Associated General Contractors*, 459 U.S. at 536 (footnote omitted). But it is possible to describe in general terms the inquiry that a court should undertake to determine whether a plaintiff may maintain the RICO claim asserted in his complaint. First, the court should examine the nature of the injury to determine whether it is of the type that Congress sought to redress through the predicate offenses relied on by the plaintiff. Second, the court should assess the directness of the relationship between the plaintiff's alleged injury and the alleged misconduct and determine whether the claim could be asserted by more directly injured persons. Third, the court should evaluate whether

[5] The inquiry for RICO claims premised on Sections 1962(a) or (b) differs from that for Section 1962(c) claims. Section 1962(a) focuses on "us[ing] or invest[ing]" income derived from a pattern of racketeering activity. The plaintiff accordingly must show an appropriate relationship between his injury and the use or investment of the allegedly ill-gotten gains. See *Craighead* v. *E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1990); *Quaknine* v. *MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990); *Rose* v. *Bartle*, 871 F.2d 331, 356-358 (3d Cir. 1989); *Grider* v. *Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.), cert. denied, 110 S. Ct. 76 (1989); but see *Busby* v. *Crown Supply, Inc.*, 896 F.2d 833, 837 (4th Cir. 1990). Because Section 1962(b) targets the use of racketeering activity to "acquire or maintain * * * any interest in or control of any enterprise," the inquiry would focus on the relationship between that conduct and the plaintiff's injury. *Midwest Grinding Co.* v. *Spitz*, 716 F. Supp. 1087, 1091 (N.D. Ill. 1989) (collecting cases). Finally, the analysis of a claim under Section 1962(d), the conspiracy provision, depends on which of the substantive provisions is implicated by the conspiracy.

the plaintiff's damages claim rests on abstract or speculative measures of harm. Fourth, the court should consider whether the damages proceedings would be unduly complex. After assessing all of these factors, the court should "exercise [its] judgment in deciding" whether the plaintiff may maintain the particular RICO damages claim. *Id.* at 537.

B. SIPC May Not Maintain A Section 1962(c) Claim Premised On Violations Of Section 10(b) Because It Was Neither A Purchaser Nor A Seller Of Securities In The Transactions At Issue.

Respondent SIPC based its RICO claim principally on the allegation that petitioner had engaged in a pattern of racketeering activity by committing "offense[s] involving * * * fraud in the sale of securities." 18 U.S.C. § 1961(1)(D). SIPC's contention is that petitioner violated Section 10(b) of the Securities Exchange Act and Rule 10b-5. See Pet. App. 10a-11a.[6] It is undisputed, however, that SIPC neither purchased nor sold securities in the transactions at issue. SIPC should not be able to rely upon Section 10(b) violations to establish its RICO claim, because—under the principles set forth above—that alleged misconduct does not bear a sufficiently close relationship to any injury it suffered.

More than 15 years ago, in *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, this Court considered "what limita-

[6] Section 1961(1)(D)'s reference to "offenses" appears to point to the criminal provision of the federal securities laws, Section 32(a) of the Securities Exchange Act, 15 U.S.C. § 78ff. That provision, in turn, refers back to the substantive sections of the securities laws and thereby incorporates Section 10(b). SIPC (Br. in Opp. 14-15) emphasizes that the predicate offense is a *criminal* violation of the securities laws, and points out that the purchaser-seller requirement is not an element of the criminal offense. But that fact is irrelevant because the focus of our analysis is the separate requirement—imposed by Section 1964(c)—of an appropriate relationship between the predicate act and the plaintiff's injury.

tions there are on the class of plaintiffs who may maintain a private cause of action for money damages for violation of Rule 10b-5" (421 U.S. at 727). The Court reaffirmed the longstanding rule—first recognized in *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952)—that "the plaintiff class for purposes of § 10(b) and Rule 10b-5 private damage actions is limited to purchasers and sellers of securities" (*Blue Chip Stamps*, 421 U.S. at 731-732). That holding is dispositive here.

The purpose of the Court's analysis in *Blue Chip Stamps* was precisely the same as the purpose of the present inquiry—to determine whether an injury sustained by persons who neither purchased nor sold securities is sufficiently related to a violation of Section 10(b) to give rise to a right to recover damages. Moreover, the considerations that the Court looked to in *Blue Chip Stamps* are the very factors that are controlling under Section 1964(c). First, the Court examined the statute itself to determine whether the injury suffered by the plaintiffs in that case was the type that Congress sought to redress in enacting Section 10(b). It concluded that the language and structure of the statute, while not dispositive, indicated that Congress intended to reach only injuries to those who purchased or sold securities. 421 U.S. at 733-736. See also *id.* at 755-760 (Powell, J., concurring).

The Court went on to consider several "policy considerations" in determining the appropriate reach of damages liability. 421 U.S. at 737. The Court observed that overturning the *Birnbaum* rule would increase the complexity of securities fraud litigation. *Id.* at 740-743. The Court also found that claims by persons who were neither purchasers nor sellers would rest to a considerable degree on speculation. As the Court explained,

> [i]n the absence of the *Birnbaum* rule, * * * * [p]laintiff's proof would not be that he purchased or

> sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock. Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant.

Id. at 745-746 (emphasis in original). The Court concluded that "[i]n the absence of the *Birnbaum* doctrine, bystanders to the securities marketing process could await developments on the sidelines without risk, claiming that inaccuracies in disclosure caused nonselling in a falling market and that unduly pessimistic predictions by the issuer followed by a rising market caused them to allow retrospectively golden opportunities to pass." *Id.* at 747. See also *id.* at 760-761 (Powell, J., concurring). To avoid the "peculiarly high degree" of danger that defendants would be subjected to liability on the basis of false oral testimony (421 U.S. at 743), the Court affirmed that only purchasers and sellers of securities may maintain damages claims under Section 10(b) and Rule 10b-5.

The definition of the appropriate plaintiff class should not change when—instead of asserting a claim under Section 10(b)—a plaintiff relies on that provision indirectly, by pleading Section 10(b) violations as predicates for an alleged Section 1962(c) RICO violation. As the Court observed in *Sedima*, the relevant injury for purposes of Section 1962(c) is the injury caused by the predicate acts. 473 U.S. at 497. Where the predicate act is an alleged Section 10(b) violation, the question is whether the injury asserted by the plaintiff is sufficiently related to the violation of Section 10(b) to permit recovery of damages. *Blue Chip Stamps* establishes that SIPC's alleged injury is *not* appropriately related to the alleged violations of

Section 10(b). Accordingly, SIPC may not maintain a damages action predicated on those violations.

Certainly nothing has happened since *Blue Chip Stamps* was decided that would alter the Court's analysis of Section 10(b)'s language and structure. Indeed, the language of RICO provides independent support for the conclusion that RICO actions predicated on Section 10(b) were intended by Congress to focus on actual purchasers and sellers of securities. RICO describes Section 10(b) and related offenses by referring to them as "offense[s] involving * * * fraud *in the sale of securities*" (18 U.S.C. § 1961(1)(D) (emphasis added)). Congress's choice of that terminology indicates that Congress's intent in including these offenses under the RICO umbrella was to combat fraud in connection with securities *sales*. As the Fourth Circuit has concluded, the language "suggests the pivotal role of the actual sales transaction." *International Data Bank* v. *Zepkin*, 812 F.2d 149, 152 (4th Cir. 1987). See also Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities,"* 18 Ga. L. Rev. 43, 62 (1983).

The inquiry under RICO also encompasses the other factors relied on in *Blue Chip Stamps*—the dangers of complex litigation and speculative damages claims. Those dangers are "increased, not diminished" by the dramatically greater recovery available under RICO, treble damages and attorneys' fees. *International Data Bank*, 812 F.2d at 153. "The larger potential recovery under RICO enhances the 'settlement value' and 'nuisance' potential of a securities fraud action—both dangers to which the *Blue Chip Stamps* Court adverted." *Ibid.* Moreover, "[t]he problems of proof noted in *Blue Chip Stamps* would also inhere" under RICO because "[n]on-sellers and non-buyers of securities would be advancing their own largely non-contradictable oral testimony about a non-event, namely their failure to sell or purchase stock. Problems of proof with respect to causation would be endless." *Ibid.*

The rationale of *Blue Chip Stamps* therefore also applies to RICO claims predicated on securities fraud. *International Data Bank*, 812 F.2d at 153; *Brannan* v. *Eisenstein*, 804 F.2d 1041, 1046 (8th Cir. 1986).[7]

That result comports with common sense. "Congress * * * did not write the RICO statute in a vacuum. It enacted this legislation * * * against the developed backdrop of almost forty years of federal securities law." *International Data Bank*, 812 F.2d at 152. A key element of that background was the *Birnbaum* rule, which, as the Court observed in *Blue Chip Stamps*, had been accepted by the lower courts for a quarter century. 421 U.S. at 731-732. "If Congress had intended the drastic result of overturning this consensus, it surely would have done so in a more explicit way." *Internationl Data Bank*, 812 F.2d at 152. See also *Sedima*, 473 U.S. at 505 (Marshall, J., dissenting) (RICO should not be interpreted to "eliminate[] decades of legislative and judicial development of private civil remedies under the federal securities laws").

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[7] Respondents suggest (Br. in Opp. 12) that the *Blue Chip Stamps* analysis is inapplicable here because the Court observed in that case that Congress could create a cause of action that expressly authorized recovery of damages by nonpurchasers and nonsellers. See 421 U.S. at 748-749. But Congress did not enact such an express remedy in the RICO statute. Nothing in Section 1964(c) mandates that such parties be permitted to maintain RICO claims. Rather, by basing Section 1964(c) on Section 4 of the Clayton Act, Congress made clear that damages recovery is limited to those plaintiffs whose injury bears an appropriate relationship to the misconduct.

The court of appeals relied (Pet. App. 12a-13a) on the lack of an express purchaser or seller standing requirement in the language of Section 1964(c) in concluding that the *Birnbaum* rule does not apply to RICO civil actions predicated on securities fraud. To begin with, as we have discussed, the language of Section 1961(1)(D) focuses on actual sales. In addition, the express language of Section 1964(c) requires that a determination be made regarding the appropriateness of the relationship between the plaintiff's injury and the alleged misconduct. Here, that determination can only be that a nonpurchaser-nonseller such as SIPC may not maintain a RICO action based on securities fraud.

It simply is inconceivable that Congress intended to override the carefully delineated limitations on damages relief contained in the prexisting remedial scheme under the federal securities laws when it included securities fraud in RICO's definition of racketeering activity. As this Court pointed out in *Blue Chip Stamps*, 421 U.S. at 746-747, the *Birnbaum* rule protects against speculative damages resting entirely on post-hoc explanations for the plaintiff's inaction. "A rule allowing this type of open-ended litigation would itself be an invitation to fraud." *Id.* at 761 (Powell, J., concurring). Congress's silence provides no justification for eliminating such an important principle, especially in a context in which the danger of unfounded claims would be *increased* by the prospect of recovering treble damages and attorneys' fees.

Congress surely intended that these interrelated statutes would be interpreted so as to strengthen enforcement of the securities laws rather than to frustrate or subvert the principles embodied in those statutes. That intention will be effectuated only if RICO is construed so that it is consistent with the remedial scheme under the securities laws. Indeed, it would be perverse to interpret RICO in a manner that guts the policy of the securities laws by overriding settled limits on damages liability, thereby opening the door to a deluge of frivolous lawsuits that would lead to the very adverse consequences that were the basis for the Court's determination in *Blue Chip Stamps*. The only reasonable way to construe the RICO statute is to apply the *Blue Chip Stamps* rule to RICO actions predicated on securities fraud. See, *e.g.*, *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Associates*, 484 U.S. 365, 380 (1988) ("[s]uch a major change in the existing rules would not likely have been made without specific provision in the text of the statute; it is most improbable that it would have been made without even any mention in the legislative history") (citation omitted). As the Fourth Circuit ob-

served, "[w]here a predicate offense already has a well-developed private right of action under federal law, we think the better view is that Congress meant for RICO simply to expand the range of *remedies* by allowing for treble damages and attorneys' fees, rather than to summarily overturn the settled law." *International Data Bank*, 812 F.2d at 153 (emphasis in original).

This Court has in other contexts construed seemingly broad federal remedies to avoid conflicts with well-settled limits on damages liability. The immunities recognized under Section 1983, for example, rest on the Court's determination "that in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989). See also *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 258. Here, Congress included securities fraud as a predicate act under RICO against the background of the well-established remedial scheme under the securities laws. The conclusion that Congress did not intend to override settled limits on damages liability is inescapable in this context as well. See also pages 15-16, *supra*. Cf. *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 23-24 (1976).

Indeed, the evidence that Congress intended to limit the RICO damages remedy in this manner is stronger than the evidence that the Court has relied on in construing Section 1983 because the very language of Section 1964(c) authorizes the court to determine in each case whether the plaintiff is an appropriate party to recover damages. The outcome of that determination in this context is clear: a plaintiff should be able to maintain a Section 1962(c) RICO damages action predicated on securities fraud offenses only if that plaintiff purchased or sold the securities in question.[8]

[8] Of course, the *Birnbaum* rule is not the only such limitation applicable to RICO damages actions premised on securities fraud. Other principles designed to determine whether the plaintiff's relationship to the alleged misconduct is sufficient to justify a damages remedy—such as, for example, loss causation rules—also apply. See, *e.g.*, *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 686 (7th Cir.), cert. denied, 110 S. Ct. 2590 (1990); cf. *Sperber* v. *Boesky*, 849 F.2d 60, 63-64 (2d Cir. 1988); *Pujol* v. *Shearson/American Express*, 829 F.2d 1201, 1204-1205 (1st Cir. 1987).

C. SIPC May Not Circumvent The Purchaser/Seller Rule By Recharacterizing The Alleged Misconduct As Violations Of The Mail And Wire Fraud Statutes.

SIPC observes (Br. in Opp. 15-16) that its RICO claims were not predicated simply on securities fraud but also alleged that petitioner engaged in mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343. Because the latter offenses also constitute racketeering activity (see 18 U.S.C. § 1961(1)(B)), SIPC contends that even if it may not base its RICO claim on securities fraud, it may proceed under RICO by simply recharacterizing identical conduct as mail and wire fraud. However, a mere shift in labels cannot relieve SIPC of the requirement of demonstrating that its injury bears an appropriate relationship to the alleged misconduct.

In applying the general principles set forth above (see pages 11-18) to determine whether a plaintiff's injury bears an appropriate relationship to a mail or wire fraud claim, courts should look to two sources of guidance. First, where—as in the securities fraud context, for example—federal law contains an offense targeting the precise type of fraud alleged by the plaintiff and, moreover, that offense is a predicate under the RICO statute, the limits on the plaintiff class eligible to recover damages under that specific offense should apply in determining whether the plaintiff may maintain a RICO claim predicated on the more general mail and wire fraud offenses. Second, if there is no more specific offense to look to for guidance, the common law principles governing recovery of tort damages for fraud provide an appropriate source for standards defining the class of plaintiffs

eligible to maintain RICO actions predicated on mail or wire fraud.

The mail and wire fraud statutes are exceedingly broad. Frequently, conduct that is violative of other, more specifically drawn federal statutes may also be characterized as mail or wire fraud. *Sedima*, 473 U.S. at 501-504 (Marshall, J., dissenting); *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking, and Business Law* 239-243 (1985); Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 Notre Dame L. Rev. 896, 939-941 (1990). The most obvious example of this phenomenon is the overlap between the federal securities laws on the one hand and the mail and wire fraud statutes on the other. The two sets of statutes are directed at the same type of harm—fraud. Few securities frauds occur without some resort to the mails or the telephone. Thus, any securities fraud claim could easily be formulated as a mail or wire fraud claim. The principles defining the class of appropriate plaintiffs under Section 10(b)—the *Birnbaum* rule and loss causation requirements, for example—are designed to identify those plaintiffs whose injury bears the requisite appropriate connection to the fraudulent activity. The same rules should therefore apply when the very same conduct is relabeled as mail or wire fraud.

Certainly the dangers of speculative damages claims and complex litigation (see pages 19-21, *supra*) would not be reduced simply because the plaintiff seeks recovery under a different legal label. "A rule allowing this type of open-ended litigation would [still] * * * be an invitation to fraud." *Blue Chip Stamps*, 421 U.S. at 761 (Powell, J., concurring) (footnote omitted). And, although the elements of the offenses are different, where the conduct alleged by the plaintiff satisfies all of the substantive requirements necessary to establish a Section 10(b) violation (and the only obstacle to maintaining a

claim under that statute is the *Birnbaum* rule or proximate cause standard), the principle of recovery that is the product of Congress's focused consideration of the issue should govern under the more general fraud offenses as well. Accord, *Brannan* v. *Eisenstein*, 804 F.2d at 1046-1047.

A contrary result would simply make no sense. Congress could not have intended to allow plaintiffs to circumvent the limitations on recovery of damages under the securities laws by casting their RICO claims in terms of mail and wire fraud. For the reasons we have discussed in connection with the securities fraud claims (see pages 22-24, *supra*), settled precedent weighs heavily against construing RICO to override these well established rules concerning limits on damages liability. Rather, the RICO damages remedy should be interpreted in a manner consistent with the federal securities law civil remedy. A plaintiff alleging conduct that constitutes securities fraud should be required to satisfy the standing rules governing securities fraud actions, even if he pleads his claim under the mail and wire fraud statutes. Cf. *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972).

A second source of guidance in fixing the class of plaintiffs entitled to invoke mail and wire fraud as predicate acts for a Section 1962(c) violation are the common law rules governing recovery of damages in fraud actions. A number of those rules—the requirements that the plaintiff be a target of the fraudulent scheme and that the plaintiff prove reliance and causation (including proximate causation)[9]—were designed to limit damages liability to those plaintiffs whose injury is appropriately related to the defendant's misconduct.

Just as *Blue Chip Stamps* analyzed the scope of the appropriate plaintiff class under Section 10(b) and is

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[9] See generally *Restatement (Second) of Torts* §§ 525-552C (1977).

therefore relevant to RICO claims predicated on Section 10(b) violations (and on fraud violations generally), these common law rules are the product of hundreds of years of analysis regarding the contours of the appropriate plaintiff class for fraud claims. The common law principles should therefore guide the availability of RICO claims predicated on mail and wire fraud violations. Indeed, these rules are based in large part on the considerations identified in *Associated General Contractors*—ensuring that the plaintiff is in the class protected by the legal right, weeding out attenuated claims of injury, and eliminating damages claims grounded in speculation.

The lower courts have generally followed this approach, concluding that a plaintiff must establish that he reasonably relied on the alleged misrepresentation in order to recover damages in a RICO action predicated on mail or wire fraud.[10] The plaintiff also must show that he was

[10] *Pelletier* v. *Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991) ("when the alleged predicate act is mail or wire fraud, the plaintiff * * * must have relied to his detriment on misrepresentations made in furtherance of that scheme"); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990) (necessary for plaintiff to show that misrepresentations were relied upon); *Brandenburg* v. *Seidel*, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988) ("while * * * it is not necessary to establish detrimental reliance by the victim in order to make out a violation of the federal mail fraud statute, such reliance is necessary to establish injury to business or property '*by reason of*' a predicate act of mail fraud within the meaning of § 1964(c)") (citations omitted, emphasis added); *Blount Financial Serv.* v. *Walter E. Heller Co.*, 819 F.2d 151, 152 (6th Cir. 1987) ("RICO civil complaint must state with particularity * * * the plaintiff's reliance."); see also *Kehr Packages, Inc.* v. *Fidelcor, Inc.*, 926 F.2d 1406, 1416 & n.3 (3d Cir. 1991) (noting that reliance must be reasonable). The Fifth Circuit has indicated to the contrary (see *Armco Indus. Credit Corp.* v. *SLF Warehouse Corp.*, 782 F.2d 475, 481-82 (5th Cir. 1986)), but a subsequent decision points in the other direction. *Zervas* v. *Faulkner*, 861 F.2d 823, 834-835 (5th Cir. 1988) (rejecting "but for" causation as sufficient, and generally endorsing the *Brandenburg* court's approach to proof of proximate cause).

an intended target of the fraudulent scheme.[11] These limitations serve to further limit the class of persons who may maintain RICO actions predicated on mail and wire fraud.

Here, SIPC's mail and wire fraud claims are subject to the same limitations as its securities fraud claims. SIPC accordingly may not maintain a RICO Section 1962(c) damages action predicated on violations of the mail and wire fraud statutes.

[11] *Pelletier*, 921 F.2d at 1499 ("when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud"); *Sperber* v. *Boesky*, 849 F.2d at 64-66 (foreseeability of injury to plaintiffs did not cure fact that they were not targets of the scheme); *Pujol*, 829 F.2d at 1205; see *Brandenburg*, 859 F.2d at 1188 (absence of directly made misrepresentations exculpatory); *Zervas*, 861 F.2d at 835 (conspiracy did not have as one of its objects the inflation of land values that allegedly caused plaintiff's injury, thus barring recovery under Section 1964(c)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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